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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1

BRUNSWICK CORPORATION,
Petitioner,

vs.

HOWELL W. CLEMENTS,
Trustee in Bankruptcy for Olympic Lanes, Inc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Brunswick Corporation respectfully requests this Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit entered on October 30, 1970.

OPINION BELOW

The order of the Court of Appeals sought to be reviewed appears in the Appendix hereto. The orders entered by the District Court for the Eastern District of

Tennessee, Southern Division, from which the appeal to the Court of Appeals was taken, also appear in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals was entered October 30, 1970. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are the same as those presented in the Petition for Writ of Certiorari in Brunswick Corporation v. Clements, No. 815, now pending before this Court.

STATUTE INVOLVED

Section 68 of the Bankruptcy Act (11 U.S.C. § 108), entitled "Set-offs and counterclaims," reads as follows:

> a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.
>
> b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate and allowable under subdivision g of section 93 of this title; or (2) was purchased by or transferred to him after the filing of the petition or within four months before such

filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.

SUPPLEMENTAL STATEMENT OF THE CASE

This case is the same case which is the subject of Brunswick Corporation's Petition for a Writ of Certiorari, No. 815, now pending before this Court.

The case began as a replevin action filed in September, 1966 by Brunswick Corporation to recover possession of certain bowling equipment which had been sold to Olympic Lanes, Inc. on conditional sales contracts. Thereafter, the Court having awarded possession of the bowling equipment to Brunswick, a foreclosure sale was had resulting in a deficiency in an amount exceeding $300,000. The defendant Olympic Lanes filed a counterclaim against Brunswick for money damages for conversion of personal property. The defendant thereafter filed a voluntary petition in bankruptcy in November, 1967, and the Trustee was substituted as a party defendant. Upon trial of the case in March, 1969 the District Court granted summary judgment to Brunswick for $356,407.07 for the deficiency owed by Olympic Lanes, Inc. and entered a verdict in favor of the Trustee for $40,000.00 upon the jury's verdict that Brunswick had converted personalty belonging to Olympic Lanes, Inc. The District Court entered an order of set-off in favor of Brunswick and granted final judgment for Brunswick in the amount of $316,407.07.

The Trustee appealed from the District Court's judgment which allowed the set-off of the $40,000 verdict. On appeal the Court of Appeals held that liability for conversion may not be set-off from money owed to the converter by the bankrupt. However, the Court of

Appeals stated in its opinion that the denying or allowing of set-off must be determined in accordance with equitable rules and that under the provisions of Section 68 of the Bankruptcy Act liability for willful conversion may not be set-off where the creditor of the bankrupt is enabled to pay himself through the device of the set-off by converting the bankrupt's property. The Court of Appeals then remanded the case for further proceedings consistent with the Court's opinion. The full opinion of the Court of Appeals is found in the Appendix to the Petition for a Writ of Certiorari, No. 815.

Brunswick requested a rehearing by the Court of Appeals on the grounds that the willfulness of the conversion was irrelevant to the question of whether set-off should be allowed, and that Brunswick was not guilty of a willful conversion. The petition for rehearing was denied and Brunswick filed a Petition for a Writ of Certiorari, No. 815, now pending before this Court.

After the petition for rehearing was denied by the Court of Appeals, Brunswick also filed motions with the District Court requesting, on the belief that certain issues were left open by the Court of Appeals, that pursuant to the mandate of the Court of Appeals the District Court hold further hearings on the issues of (1) the willfulness of the conversion and (2) the prejudice to other creditors resulting from the setoff. Brunswick's Additional Motion to Set for Further Hearing appears in the Appendix hereto. The District Court, on August 11, 1970, denied Brunswick's motion on the ground that under the opinion of the Court of Appeals the willfulness of the conversion and the prejudice to other creditors were not issues in determining whether the setoff should be allowed. On July 23, 1970, prior to ruling on Brunswick's motion for further hearings, the District Court entered an order on mandate vacating the order of set-off. The District Court's orders appear in the Appendix

hereto. Brunswick appealed from the orders of the District Court. These facts were disclosed to this Court in the footnote appearing on page 7 of the Petition for a Writ of Certiorari, No. 815.

On appeal, on October 30, 1970, the Court of Appeals dismissed Brunswick's appeal. The order of the Court of Appeals appears in the Appendix hereto. The effect of this order was to ratify and confirm the District Court's interpretation of the opinion of the Court of Appeals that willfulness of the conversion was not an issue in determining whether set-off should be allowed.

REASONS FOR GRANTING THE WRIT

Brunswick filed its Petition for a Writ of Certiorari, No. 815, seeking review of the opinion of the Court of Appeals, despite the fact that the Court of Appeals had remanded the case to the District Court for further proceedings consistent with the Court of Appeals' opinion. However, in order to clarify the opinion of the Court of Appeals, Brunswick filed a motion before the District Court requesting a further hearing on the issues which Brunswick believed the Court of Appeals had failed to resolve, namely whether or not Brunswick was guilty of a willful conversion and whether or not other creditors of the bankrupt were prejudiced by the set-off.

The District Court's orders denying Brunswick a hearing on the issues of willfulness and prejudice to other creditors and vacating the order of set-off without holding further hearings, and the order of the Court of Appeals dismissing Brunswick's appeal from the orders of the District Court, clarify the opinion of the Court of Appeals which is the subject of Brunswick's first Petition for a Writ of Certiorari. There is now no question that the Court of Appeals has held that a converter is never to be allowed the right of set-off granted under Section

68 of the Bankruptcy Act, regardless of the fact that the conversion was innocent and merely technical and regardless of the fact that the conversion occurred more than one year prior to the bankruptcy.

Brunswick is filing this second Petition so that the entire case, including the Court of Appeals clarification of its first opinion, is before this Court.

CONCLUSION

For the above, reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX

ORDER ON MANDATE

(Filed July 23, 1970)

The defendant Howell W. Clements, Trustee in Bankruptcy for Olympic Lanes, Inc., having appealed to the United States Court of Appeals for the Sixth Circuit from the order of the District Court allowing set-off of the judgment which said Clements had obtained against the plaintiff, Brunswick Corporation, against the judgment in favor of Brunswick; and, the Court of Appeals for the Sixth Circuit having vacated said set-off by order entered April 17, 1970, which was issued as its mandate on July 6, 1970, it is hereby

ORDERED that the case is hereby restored to the docket, the order of set-off heretofore entered is hereby vacated, and the judgment entered April 7, 1969 modified by striking therefrom paragraphs four and five of the decree, and replacing them with a new paragraph four to read as follows:

"That the defendant Howell Clements be awarded as costs in this case his costs on appeal as set out in the mandate and as proven in this Court, and the costs in this Court will be born by the parties incurring them."

When the amount of the judgment, $40,000.00, plus interest at 6% from April 7, 1969 until paid into Court (making $43,200.00 as of August 7, 1970) it will be disbursed to Howell W. Clements, Trustee in Bankruptcy for Olympic Lanes, Inc.

Approved for entry:

ROBT. L. TAYLOR

United States District Judge.

ADDITIONAL MOTION TO SET CAUSE FOR FURTHER HEARING.

(Filed August 5, 1970.)

Brunswick Corporation, by and through its attorneys, files its additional motion to set this cause for a further hearing, and incorporates herein by reference all the matters set out in its original motion and supporting brief of June 16, 1970, and its renewed motion filed on July 9, 1970. As additional grounds for its said motion, Brunswick Corporation states as follows:

1. On April 7, 1969 this Court entered an order setting off the respective judgments of the parties to this lawsuit. On appeal, the Court of Appeals for the Sixth Circuit vacated the order granting the setoff and remanding the cause "for further proceedings" consistent with its opinion. In its opinion the Court of Appeals held that liability for willful conversion may not be set off from money owed to the converter by the bankrupt where the creditor of the bankrupt is enabled "to pay himself through the device of setoff by converting the bankrupt's property." Since the Court of Appeals did not have before it any determination by the District Court as to whether Brunswick Corporation was guilty of a willful conversion or whether Brunswick Corporation in effect paid itself by the conversion at the expense of other creditors, it is obvious that the Court of Appeals desired a further hearing so as to determine these matters.

2. The District Court has taken no action on the motion filed by Brunswick Corporation on June 16, 1970 requesting a further hearing into these issues. By the same token, the District Court has taken no action on Brunswick Corporation's renewed motion filed on July 9, 1970. Instead, the District Court has entered an

Order on Mandate submitted by the attorneys for Howell W. Clements, Trustee in Bankruptcy for Olympic Lanes, Inc. This Order on Mandate was filed on July 23, 1970. This Order on Mandate apparently vacates in its entirety the order of setoff entered on April 7, 1969 without any further determination being made by this Court as to whether there was a willful conversion on the part of Brunswick Corporation or whether Brunswick Corporation in effect paid itself by the conversion at the expense of other creditors.

3. So there will be no misunderstanding, Brunswick Corporation has filed this Additional Motion requesting a further hearing into the issues which have heretofore been undetermined, from the standpoint of a record, by this Court. To deny a further hearing would be in conflict with the mandate of the Court of Appeals. To deny a further hearing would also deprive Brunswick Corporation of its right to make a record in this cause because there is *no* evidence anywhere in the record of this case as to whether Brunswick Corporation was guilty of a willful conversion or whether it paid itself through the device of the conversion to the detriment of other creditors.

4. Inasmuch as Howell W. Clements, Trustee in Bankruptcy for Olympic Lanes, Inc., did not on the appeal of this case seek to vacate the setoff on the ground that Brunswick was guilty of a willful conversion, the Court of Appeals acted on its own initiative in vacating the setoff and remanding the case for "proceedings consistent with its opinion." The only reason the Court of Appeals would have remanded the case for further proceedings would be for a determination of whether or not Brunswick Corporation was guilty of a willful conversion or whether Brunswick Corporation by the conversion paid itself to the detriment of other

creditors. If this Honorable Court should now deny a further hearing it would also be acting contrary to its own previous findings made at the trial of this cause. This Court directed a verdict in favor of Brunswick Corporation on the claim made against it for punitive damages. Howell W. Clements, Trustee in Bankruptcy for Olympic Lanes, Inc., did not appeal this ruling. If this Court should now deny a further hearing it would in effect be overturning its own ruling on punitive damages, which of course was a finding by this Court that Brunswick Corporation did not act willfully when it converted the property.

5. Brunswick Corporation respectfully requests an evidentiary hearing so as to determine whether or not there was a willful conversion and whether or not other creditors were prejudiced by the conversion and whether there are any other reasons why the setoff should not be allowed.

SPEARS, MOORE, REBMAN & WILLIAMS,

Attorneys for Brunswick Corporation.

ORDER DENYING MOTIONS FOR FURTHER HEARING.

(Filed August 11, 1970.)

The Court of Appeals vacated this Court's order granting the set-off. We are advised that a petition for rehearing was filed but denied. The Court of Appeals stated that the "only issue is whether a conversion judgment against a creditor of the bankrupt can be set off from money owed the creditor by the bankrupt which arose under a contract." It was specifically held that conversion liability may not be set off against contract claims. In the light of this holding, the question of

whether there was a willful conversion on the part of Brunswick or whether Brunswick in effect paid itself by the conversion at the expense of other cerditors was not pertinent.

We are bound by the decision of the Court of Appeals.

It is, thereofore, ORDERED that all motions to set the case for further hearing be, and same hereby are, denied.

Enter:

ROBT. L. TAYLOR,
United States District Judge.

No. 20,763

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRUNSWICK CORPORATION, *Plaintiff-Appellant,*	)	
v.	)	ORDER
HOWELL W. CLEMENTS, *Defendant-Appellee.*	)	

Before: WEICK, CELEBREZZE and BROOKS, Circuit Judges

A motion to dismiss this appeal has been filed by defendant-appellee and the case has been assigned pursuant to Rule 3(e) of this Court. The appeal is from the order entered in this action by the District Court on the

Mandate of the Court of Appeals and from the order of the District Court refusing to grant a further hearing premised on plaintiff-appellant's interpretation of this Court's opinion in the original appeal (Brunswick Corporation v. Howell W. Clements, Trustee, No. 19,689). The District Court, in denying the request for a hearing, held that appellant's interpretation of this Court's opinion was incorrect; raised questions not pertinent to the controlling issue; and that the opinion and mandate of this Court was clear. We agree.

The motion to dismiss filed by appellee is sustained and it is ORDERED that the appeal is dismissed.

Entered by order of the Court

/s/ Carl W. Reuss
Clerk